STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals,
Peter D. O'Connell (Presiding Judge), Patrick M. Meter, and Michael F. Gadola

CLAM LAKE TOWNSHIP, a Michigan general law township; and HARING CHARTER TOWNSHIP, a Michigan charter township,

Appellants,

v

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS (THE STATE BOUNDARY COMMISSION), a state administrative agency; TERIDEE LLC, a Michigan limited liability company; and, THE CITY OF CADILLAC, a Michigan home rule city,

Appellees.
_____/

Supreme Court Case No. 151800

Court of Appeals Case No. 325350

Wexford County Circuit Case No. 14-25391-AA
Honorable William M. Fagerman

State Boundary Commission Docket 13-AP-2

BRIEF ON APPEAL – APPELLANTS
ORAL ARGUMENT REQUESTED

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ORDER APPEALED FROM AND RELIEF SOUGHT

Appellants, the Township of Clam Lake ("Clam Lake") and the Charter Township of Haring ("Haring") (collectively, the "Townships"), are appealing a quasi-judicial administrative decision made by Appellee, the State Boundary Commission ("SBC"), on June 11, 2014, in SBC Docket No. 13-AP-2, which invalidated the Townships' Conditional Transfer Agreement and approved an annexation petition covering the same lands. Appendix, 11a-125a. That decision became final by Order of the Director of the Department of Licensing and Regulatory Affairs ("LARA"), entered on June 26, 2014 (hereafter, the "SBC Decision"). *Id*., 127a-128a. The SBC Decision was affirmed by an Opinion on Appeal entered by Judge Fagerman of the Wexford County Circuit Court on December 9, 2014, in Case No. 14-25391-AA. *Id*., 130a-144a. The Townships thereafter sought leave to appeal from the Court of Appeals, but the Court of Appeals denied the Townships' Application for Leave to Appeal by way of an Order entered May 26, 2015. *Id*., 146a.

The Townships now seek reversal of the lower court and tribunal decisions, on grounds that (a) the SBC does not have subject matter jurisdiction to consider and decide the validity of a conditional transfer agreement; (b) even if the SBC has jurisdiction over conditional transfer agreements, the SBC unlawfully exercised its jurisdiction in this case, because the Townships' conditional transfer agreement is valid; and, (c) collateral estoppel should have resulted in denial of the annexation petition filed by co-Appellee, TeriDee, LLC. Upon reversal, the Court should hold and declare that (a) the SBC's approval of the TeriDee annexation petition is void; (b) the Townships' conditional transfer agreement is valid and enforceable; and, (c) the lands that are subject to the Townships' conditional transfer agreement have been within Haring's jurisdiction since June 10, 2013, when the Act 425 Agreement became effective.

BASIS OF JURISDICTION

This Court has jurisdiction to consider and decide the Townships' appeal pursuant to 1963 Mich Const, art. VI, §4; MCL 600.215; and, MCR 7.303(B)(1). Leave to Appeal was granted by way of an Order entered by this Court on April 6, 2016. Appendix, 148a.

STATEMENT OF QUESTIONS PRESENTED

In the Order granting the Townships' Application for Leave to Appeal, the Court ordered the parties to brief the following questions:

I. Does the State Boundary Commission ("SBC") have the authority to determine the validity of an agreement made pursuant to the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425 (Act 425"), MCL 124.21, *et seq*.?

A. The State Boundary Commission answered "Yes."

B. The circuit court answered, "Yes."

C. The Court of Appeals did not decide this question.

D. Appellants answer, "No."

E. Appellees would answer, "Yes."

II. If the SBC has authority to determine the validity of a Conditional Transfer Agreement, did the SBC in this case properly determine that the Townships' Agreement was invalid?

A. The State Boundary Commission answered "Yes."

B. The circuit court answered, "Yes."

C. The Court of Appeals did not decide this question.

D. Appellants answer, "No."

E. Appellees would answer, "Yes."

III. Despite the language of MCL 117.9(6) and MCL 123.1012(3), did the doctrine of collateral estoppel apply to invalidate the SBC's 2014 approval of TeriDee's petition for annexation on the basis of the SBC's denial of the same property owner's petition in 2012?

A. The State Boundary Commission answered, "No."

B. The circuit court answered, "No."

C. The Court of Appeals did not decide this question.

D. Appellants answer, "Yes."

E. Appellees would answer, "No."

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

A. Introductory Overview

In general terms, this Application presents the Court with a situation where there is a Conditional Transfer Agreement (aka "Act 425 Agreement") and an annexation petition covering the same Township lands. Clam Lake and Haring approved their Act 425 Agreement on May 8, 2013, pursuant to Act 425 of 1984 ("Act 425"), MCL 124.21, *et seq*. Thereafter, on June 5, 2013, co-Appellee, TeriDee, LLC ("TeriDee"), submitted an annexation petition to the State Boundary Commission ("SBC"), seeking annexation of a portion of the exact same Township lands into the territory of co-Appellee, the City of Cadillac (the "City"). In this situation, Act 425 plainly states that the annexation "shall not take place":

> "While a contract under [Act 425] is in effect, another method of annexation or transfer **shall not take place** for any portion of an area transferred under the contract." MCL 124.29 [emphasis added].

However, in the SBC proceedings below, TeriDee and the City argued that the Act 425 Agreement is invalid, and that TeriDee's annexation petition should therefore be approved. The SBC decided in TeriDee's and the City's favor, finding that the Agreement is invalid, and approving the annexation of TeriDee's property into the City. Appendix, 11a-128a. The circuit court upheld the SBC Decision on appeal. *Id*., 130a-144a. The Court of Appeals denied leave to appeal. *Id*., 146a**.**

In the context of reviewing those decisions, it is important to know that TeriDee submitted an *identical* annexation petition to the SBC on June 3, 2011, and the SBC *denied* that identical petition on October 3, 2012, finding that these same lands should *not* be annexed into the City because the petition did *not* satisfy the standards of §9 of the State Boundary Commission Act, MCL 123.1009. With these conflicting results in mind, provided below is a detailed review of the pertinent facts.

B. History of the US-131/M-55 Interchange

The lands at issue in this appeal are located to the southeast of the intersection of Highway

US-131 and Highway M-55 (the "Subject Area"). *Id*., 852a-855a.[1] Certain facts about these lands are undisputed, as follows:

- The City's jurisdictional boundaries have always been limited to the west side of US-131; only Township lands are located to the east of US-131. *Id*., 1048a.

- The Subject Area and all of the surrounding township lands to the north, east and south are either occupied by a population of single-family residences or are vacant. *Id*., 1037a. To the west, there is nearly one-half mile of highway interchange separating the Subject Area from the City. *Id*., 855a.

- On the west side of the US-131/M-55 interchange, within the City, the established land use is primarily single-family residential, with a mix of a few churches and one medical building. *Id*., 1435a.

- For many decades the Subject Area has been planned and zoned by Wexford County for Forest-Recreation uses. *Id*., 981a-982a; 1045a; 1431a-1432a.

- The long-established City, Township, County and State land use plans for this interchange (Exit 180) have consistently determined that the Subject Area should *not* be used for unrestricted commercial purposes. Specifically:

    1. The 1994 County master plan stated that Exit 180 should be established as a "soft interchange" in a residential area. *Id*., 1045a.

    2. The County Plan was updated in 2004. The County decided that the 1994 Plan was *not* changing, and that the area would continue to be planned for rural residential and/or agricultural-forest production uses, and is outside the designated urban growth boundary. *Id*., 1431a-1432a.

    3. The City of Cadillac's own 1994 Long Range Comprehensive Plan states that commercial use should be restricted at the US-131/M-55 interchange, and encourages the County and the Townships to implement this same strategy on their side (east) of the highway interchange. *Id*., 1434a-1436a. Cadillac continued the same land use plan in its most recent Master Plan, prepared in 2002. *Id*., 1005a.

    4. In 1999, the City, Haring and Clam Lake jointly prepared a land use plan known as the *Cadillac Area Corridor Study*, which was intended to provide "design concepts and standards which can be applied to future development and redevelopment opportunities occurring along . . . *the new interchanges*," including the M-55 interchange. *Id*., 1548a. In pertinent part, the *Corridor*

[1] The Appendix includes the following maps: (a) the annexation-area map from TeriDee's petition (p. 852a); (b) the Transferred Area map from the Act 425 Agreement (p. 853a); (c) a map from the annexation petition, showing the annexation area in relation to the City boundaries (p. 854a); and (d) an aerial photograph, showing the annexation area in relation to the US-131/M-55 interchange right-of-way (p. 855a).

Study encourages the M-55 interchange to remain rural and natural, with open vistas. *Id.*, 1560a. Box-like development with large, stark walls is discouraged. *Id.*, 1559a-1560a.

5. The County denied a request for commercial zoning of the Subject Area in 2001. *Id.*, 1046a.

6. In 2003, the County received a request to change the master plan designation for the Subject Area to commercial. The County denied that request. *Id.*

- Despite all of the above, TeriDee wants to develop the Subject Area for a large-scale, highly-intensive commercial development that would include "Big Box" and "Mid Box" stores. *Id.*, 1294a; 1461a-1463a.

- In 2008, TeriDee sought approval of an Act 425 Agreement between Clam Lake and Cadillac that would have allowed unrestricted commercial development of the Subject Area. At a referendum election, the voters overwhelmingly rejected the Act 425 agreement, by a margin of about 4 to 1. *Id.*, 965a.

- On June 3, 2011, TeriDee submitted an *identical* annexation petition (i.e., identical to the petition at issue in this appeal) to the SBC, for the purpose of attempting to have its property annexed into the City for commercial development. *Id.*, 1808a.

- On October 3, 2012, the SBC issued its final decision that denied the TeriDee petition. That decision was supported by the factual finding that the Subject Area was both zoned and planned by the County for Forest Recreation uses. *Id.*, 1117a (¶4).

In short, the SBC already determined, in a final adjudicative decision entered on October 3, 2012, that the Subject Area should *not* be annexed into the City, based on the *undisputed* facts listed above. However, against this undisputed factual background, it is likewise undisputed that the SBC suddenly changed course 180°, and then approved an *identical* annexation petition for the exact same lands on June 11, 2014, even though there had been absolutely no change in material conditions between the denying and approving decisions. The following is a description of the events that have transpired since October 2012, which have led to these dichotomous results.

C. SBC Decision on the Townships' 2011 Act 425 Agreement

When the SBC denied TeriDee's first annexation petition on October 3, 2012, it also invalidated the Townships' 2011 Act 425 Agreement that was then in effect at that time, covering

the same lands. *Id*., 1117a-1118a.[2] The SBC's decision to invalidate the 2011 Agreement was based on a finding that the Agreement "was not being used to promote economic development." *Id*. In support of that finding, the SBC made five discrete conclusions, as follows:

> "a. No clearly defined economic development project is named.
>
> "b. Clam Lake received no benefit from the agreement, i.e., there is no revenue sharing included.
>
> "c. Copies of emails obtained by the petitioner through a [FOIA] request . . . between Clam Lake Township and the Charter Township of Haring discuss the 425 Agreement as a means to deny the Commission jurisdiction over the proposed annexation.
>
> "d. Concern over the Charter Township of Haring's ability to effectively and economically provide the defined public services. No cost study was proven to analyze the differential of connecting the area to public services from the Charter Township of Haring versus connecting to services from the City of Cadillac.
>
> "e. The timing of the Act 425 Agreement. The agreement was executed more than three months after the annexation request was filed." *Id*.

Provided below is a discussion of how these issues were addressed in the Townships' 2013 Act 425 Agreement. That discussion is predicated, however, by a summary of why and when the 2013 Agreement came into being, following the 2011-2012 annexation proceedings.

D. The Townships' 2013 Act 425 Agreement

In setting the stage for the events that transpired *after* the SBC's October 3, 2012 decision, it is important to remember that the SBC had already determined that TeriDee's property should *not* be annexed into the City. In that predicate context, a series of events thereafter unfolded that led the Townships to enter another Act 425 Agreement for the purpose of facilitating the sharing of utility services that would promote economic development. Most significantly, any contingency that had previously existed, with respect to Haring's ability to provide wastewater services to Clam Lake, was eliminated by mid-2013. The following specific events occurred by the mid-2013 timeframe:

[2] The Townships' 2011 Agreement is no longer in effect, and its validity is not at issue in this appeal.

- All financing for the new Haring wastewater treatment plant ("WWTP") was approved. In addition to the $1 million letter of credit that Wal-Mart had issued to finance the construction of the new WWTP (*id*., 1142a-1144a), Haring was approved for a Rural Development ("RD") grant in the amount of $595,000, and a RD loan in the amount of $2,931,000 (*id*., 1146a-1156a)
- Haring submitted its administratively complete application for an NPDES permit for the new WWTP, and said permit was subsequently issued. *Id*., 1167a-1189a.
- After the Haring Board published, on March 26, 2013, its Notice of Intent to issue bonds for repayment of the RD loan, the 45-day referendum period expired with no petition having been filed, thus allowing Haring to issue bonds and proceed with construction. *Id.*, 1158a-1165a.

In short, the Haring WWTP became a "sure thing" by mid-2013.[3] Given this development, and given Cadillac's rigid adherence to a policy of refusing wastewater service to the surrounding townships without permanent acquisition of the served township lands (*id.*, 1191a-1193a) the Townships approved a second Act 425 Agreement on May 8, 2013 (covering TeriDee's property and also some adjacent lands – the "Transferred Area"), through which Haring water and wastewater services are required to be extended to TeriDee's property to facilitate an economic development project thereon. *Id*., 728a-729a (Art. I, §§ 3 and 4(a)).[4] And, for the longer term, the Townships also included provisions in the 2013 Agreement to facilitate the extension of Haring sewer services to the Clam Lake DDA. *Id.*, 729a-731a (Art. I, §4(b)).

Also, being mindful of the SBC's findings with respect to the 2011 Act 425 Agreement (*id*., 1117a-1118a), the Townships ensured that all concerns the SBC had about the content of the 2011 Agreement were addressed in the 2013 Agreement:

- <u>There is a clearly defined economic development project</u>. Not only are Haring water and wastewater services required to be extended to the Transferred Area, the 2013 Agreement also provides that the owners of the undeveloped portion of the Transferred Area may seek rezoning to a mixed-use commercial/residential planned unit development ("PUD") district.

[3] *See* also, *id*., 1665a-1806a (Township motion filed with the SBC on March 27, 2014, documenting that the Haring WWTP was fully-approved by the MDEQ, fully-financed, and scheduled to be ready for service to the Transferred Area by June 30, 2015.)

[4] This requirement is conditioned upon (a) completion and availability of the Haring WWTP, and (b) Clam Lake obtaining financing and paying for the extension of sewer and water lines to the Transferred Area. *Id*.

Haring has already adopted mixed-use commercial/residential PUD regulations into its zoning ordinance. *Id*., 1489a-1506a. The regulations were later amended (*id*., 1649a-1663a), but remained consistent with the *Corridor Study*.

- Clam Lake will receive a financial benefit. The Townships have agreed that when Haring utilities are extended into the Transferred Area, they will amend the Agreement to share the revenues from those utilities. *Id*., 747a (Art II).
- Haring will effectively and economically provide utility services. The Townships performed a cost study to show that Haring sewer and water services can be provided to the Transferred Area at a cost that is *less* than the cost of providing City sewer and water services to the Transferred Area, when taking into account the additional tax burden that necessarily accompanies City services. *Id*., 1349-1351a.
- The timing of the 2013 Agreement was proper. The Agreement was approved on May 8, 2013, at a time when no annexation petition had even been filed with the SBC. *Id*., 1195a-1200a. Moreover, it was approved at a time when the SBC had already determined, just eight months earlier, that TeriDee's property should *not* be annexed into the City. *Id*., 1112a.

The Townships' 2013 Act 425 Agreement became effective on June 10, 2013, when it was signed by each Township and filed with the County Clerk and Secretary of State. *Id*., 723a. The Townships subsequently adopted a first and second amendment to the Act 425 Agreement, which were in effect at the time of the SBC Decision. *Id*. at 944a-959a; 1630a-1635a.

Unrelated to the substantive content of the Townships' Act 425 Agreement, it is undisputed that there were no e-mails (or any other communications) exchanged between Haring and Clam Lake Board members, suggesting that they had any improper motives for developing the 2013 Agreement. There *is* record evidence, however, showing that *one* member of the public, George Giftos, cc'd certain e-mails to two of the 12 Board members (i.e., the Supervisors of Haring and Clam Lake), stating his personal belief that the Act 425 Agreement could be used to prevent TeriDee from gaining annexation and developing its property as it desired. *Id*., 111a-125a. Mr. Giftos, who resides directly across M-55 from the Transferred Area (*id*., 1011a), sent these e-mails to a neighborhood group consisting of 32 persons, and merely included the two Supervisors on the cc list. *Id*., 111a-120a; 123a; 125a. The City and TeriDee took the position in the SBC proceedings, and in the circuit court, that these unsolicited e-mails, from *one* member of the public, was evidence of a broad conspiracy of unlawful motives by the entirety of each Township Board. What the City and TeriDee

failed to honestly acknowledge to the SBC, however, is that not a single one of these particular e-mails had been generated by a Clam Lake or Haring Board member, who are the *only* persons having the authority to develop and approve an Act 425 Agreement. *Id*., 111a-125a. Moreover, with respect to all but four of the neighborhood e-mails, Supervisor Rosser was the only Board member to have received them. *Id*. Supervisor Scarbrough is the only other Board member who received anything, and he received just four of these e-mails. *Id*., 111a, 123a-125a. That leaves ten other Board members who received *nothing*. Importantly, neither of the two Supervisors responded to these e-mails, expect once, when Supervisor Rosser responded to an inquiry about the Townships' intended "course of action" by stating: "Nothing to say at this time. We are just exploring options that may be available to us." *Id*., 122a.

In relation to this same subject, the *undisputed* record evidence is that the Giftos e-mails were not shared with anyone else and had no influence on the Board members' decision to enter the Agreement. *Id*., 307a. There is *no evidence* in the record to contradict this. Consistent with the undisputed fact that Mr. Giftos had absolutely no role in the Act 425 process, his May 4, 2013 e-mail contains the admission that he had been relying on "second hand" information that is "not necessarily accurate." *Id*., 124a. Reflective of his non-participation in the Act 425 process, Mr. Giftos had to e-mail Supervisor Rosser to find out what was going on. *Id*., 122a ("What was the result of the meeting . . . [I]s there anything I can pass along as far as the course of action.").

E. The 2013-2014 SBC Proceedings

TeriDee submitted its 2013 annexation petition to the SBC on June 5, 2013 (*id*., 760a-850a) seeking annexation of a substantial portion of the Transferred Area into the City, even though the Townships had approved their Act 425 Agreement for these same lands, nearly a month earlier. As a result of the Court of Appeals' decision in *Casco Twp v State Boundary Commission*, 243 Mich App 392, 397; 622 NW2d 332 (2000), *app den*, 465 Mich 855; 632 NW2d 145 (2001), the SBC exercised

its ostensible jurisdiction so as to consider, in a consolidated proceeding, (a) whether the Act 425 Agreement is valid, and (b) whether the annexation should be approved. *Id*., 941a.

The SBC proceedings followed the usual procedural course for annexation matters, and culminated with an adjudicative session on April 16, 2014. At that meeting, the SBC voted, 4-1, to find that the Townships' Act 425 Agreement is invalid. *Id*., 1889a. Based on that decision, the SBC proceeded to vote on the annexation petition, and approved it by a 4-1 vote. *Id*. At its subsequent meeting on June 11, 2014, the SBC's decision was formally incorporated into a proposed Summary of Proceedings, Findings of Fact and Conclusions of Law ("SOPFOFCOL"). *Id*., 11a-125a. The SOPFOFCOL concluded that the Agreement is invalid because "it was not being used to promote economic development," and offered five reasons for that conclusion. *Id*., 13a-14a.

The SOPFOFCOL was approved by Final Decision and Order of the Director of LARA on June 26, 2014 (*id*., 127a-128a), thus triggering a right of judicial review on that date. *See* MAC R 123.23. The Final Decision and Order was served on the Townships on July 1, 2014 and was received by the Secretary of State, Office of the Great Seal, on July 2, 2014. *Id*., 1922a.

F. Circuit Court Appeal Proceedings

The Townships timely filed their Claim of Appeal in the Wexford County Circuit Court on July 2, 2014. After full briefing, the circuit court heard oral arguments on October 15, 2014. *Id*., 490a-624a. Thereafter, on December 9, 2014, the circuit court entered its final Opinion on Appeal. *Id*.,130a-144a. The Opinion on Appeal affirmed both parts of the SBC Decision. The circuit court held, in pertinent part, as follows:

1. Act 425 Agreement

On the authority of *Casco Twp*, the circuit court held that whether an Act 425 agreement complies with the criteria of the Act 425 statute is a *factual* question that is subject to review under the substantial evidence test (*id*., 135a-137a); it is not a legal question to which de novo review

would apply (*id*., p. 139a). When applying this predicate holding, the circuit court held that the SBC's decision to invalidate the Act 425 Agreement, as reflected at ¶6 of the SBC Decision, is supported by competent, material and substantial evidence. *Id*., 137a-139a. In reaching this conclusion, the circuit court did not identify any specific record evidence that supported the SBC's Decision (*id*.), except to make a cursory reference that Appellees had "point[ed] out" that the Act 425 Agreement was a "quick and unplanned enactment," made by the Townships after "learning of the annexation petition" (*id*., 137a).

2. The Annexation Decision

In regard to the Townships' legal argument that the SBC should have denied the annexation petition under principles of collateral estoppel, the circuit court acknowledged that this was an issue of first impression in Michigan, but held that the SBC is exempt from collateral estoppel under MCL 117.9(6). *Id*., 141a-143a.

G. Application for Leave to Appeal to Court of Appeals

The Township filed a timely Application for Leave to Appeal with the Court of Appeals on December 29, 2014. The Court of Appeals (Judge O'Connell presiding) denied the Townships' Application by way of an Order entered May 26, 2015. *Id*., 146a

INTRODUCTION AND SUMMARY OF ARGUMENTS

As a prelude to the Court's consideration of the below arguments, the Townships present this summary and explanation of why this case is so important. This will foreshadow and give some better context to the Townships' subsequent arguments. It will also help to demonstrate why it is so vitally important for this Court to reign-in the SBC from its unlawful power grab, by which it is now refusing to recognize the validity of *any* Act 425 Agreement that might interfere with its authority to approve annexation petitions. This abuse of administrative authority needs to be stopped, so as to place the State's jurisprudence back in proper alignment, insofar as the law of municipal boundary

disputes, intergovernmental contracts and administrative law are concerned.

A. The Problem: *Casco Township*

"Every now and then, the law takes a bad turn."[5] The *Casco Twp* decision bears out the truth of this observation. *Casco Twp* holds that the SBC has subject matter jurisdiction to determine whether an Act 425 agreement is valid in those circumstances where there is a competing annexation petition covering the same lands. In so holding, the *Casco Twp* panel *sub silentio* "overruled" at least a century of well-established Michigan law, including a number of this Court's opinions which make clear that the SBC cannot possibly be endowed with subject matter jurisdiction over Act 425 agreements. The conclusion necessarily follows from the simple observation that the SBC is not mentioned – not even once – in the Act 425 statute, MCL 124.21, *et seq*. This renders the SBC impotent, insofar as Act 425 agreements are concerned. The Court should intervene to correct the "bad turn" reflected by *Casco Twp*, through which the SBC is exercising authority that is outside it statutory jurisdiction, in derogation of this Court's binding decisions.

And the problems of *Casco Twp* go well beyond its jurisdictional error. With all due respect to the panel of judges who authored *Casco Twp*, that decision might justifiably be portrayed as a poster child for lack of judicial restraint – which is to say that it represents (in large part) an improvident judicial foray into commenting on certain matters, *in dictum*, that were clearly not before the court for decision. More on that subject below. For present purposes, however, it suffices to say that the SBC has unfortunately latched onto this dictum for the purpose of engaging in conduct that – jurisdictional issues aside – cannot be justified by the plain language of Act 425.

More specifically, the SBC now believes that the dictum of *Casco Twp* endowed it with the authority to subjectively pick "winners" and "losers" between two types of planned economic

[5] Attributed to Don LeDuc, President and Dean of Western Michigan University Thomas M. Cooley Law School; Author, *Michigan Administrative Law* (Thomas Reuters, 2014 Ed.).

development projects, when one is planned under an Act 425 agreement and the other is planned through annexation. Stated another way, the SBC now believes it has the authority to adjudicate, not just whether an Act 425 agreement satisfies the criteria of the Act 425 statute, but to also adjudicate which is more *subjectively desirable*: an Act 425 agreement or annexation. As shown below, the SBC accomplished this unparalleled power reach by engrafting new requirements on Act 425 that do not exist, and by otherwise ignoring its plain terms.

The end result is that, since the time of the *Casco Twp* decision, the SBC has refused to acknowledge the validity of *any* Act 425 agreement, if it was challenged on the ground that it would interfere with a proposed annexation. This includes, most recently, the Act 425 Agreement at issue in this appeal. Perhaps the best way to describe the situation is that the SBC has *never* met an Act 425 agreement it didn't think was invalid, if it was challenged by a party who would instead prefer annexation.[6] The Court should reverse the lower court and tribunal decisions, to rectify this ongoing abuse of administrative authority.

B. Collateral Estoppel and The SBC

The SBC's decision to approve the TeriDee annexation petition provides another independent ground for the Court to reverse the lower court and tribunal decisions. The Townships argued below that, under principles of collateral estoppel, the SBC was required to deny the annexation because the SBC had denied the exact same petition, submitted by the exact same parties, just eight months earlier, based on the exact same statutory criteria (MCL 123.1009), when there had been absolutely no intervening change in a material circumstances. As the circuit court acknowledged, the legal question of whether collateral estoppel applies to the SBC is "one of first impression within the State of Michigan." Appendix, 143a. The Court should decide this issue of first impression, and should

[6] This is not hyperbole. The record demonstrates that, since the time of the *Casco Twp* decision, the SBC has invalidated *every* Act 425 agreement it has been asked to invalidate. *See* Appellants' Reply to Answer of the City of Cadillac, p. 2, Exb. 4 (published SBC Decisions), filed 2/5/15 in the Court of Appeals.

hold that the SBC is bound by principles of collateral estoppel, so that the SBC does not continue to engage in arbitrary and capricious decision-making, as it did in this case.

ARGUMENTS

Standard of Review – General. SBC decisions are subject to direct review in the circuit court under the Michigan Administrative Procedures Act ("APA"), MCL 24.201, *et seq*; and, MCR 7.103(A)(3). *Casco Twp* at 397. Under Section 106 of the APA, the Court "shall hold unlawful and set aside" an order of the SBC if "substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

(a) In violation of the constitution or a statute.

(b) In excess of the statutory authority or jurisdiction of the agency.

(c) Made upon unlawful procedure resulting in material prejudice to a party.

(d) Not supported by competent, material and substantial evidence on the whole record.

(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law." MCL 24.306.

In turn, after the circuit court has reviewed an administrative decision under the APA, the Court of Appeals and/or the Supreme Court reviews the circuit court's decision to determine whether the circuit court "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Galuszka v State Employees Retirement System*, 265 Mich App 34, 39; 693 NW2d 403 (2004) (quoting *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996)). *See* also, *Dep't of Civil Rights ex rel Johnson v Silver Dollar Café*, 441 Mich 110, 128; 490 NW2d 337 (1992). When applying the first aspect of this review standard (i.e., application of "correct legal principles"), this Court reviews questions of law do novo. *Galuszka, supra* at 38. Each of the below arguments is predicated by a more detailed discussion of the more specific standard of review that is applicable, in relation to the specific error of law being alleged.

I. THE SBC DOES NOT HAVE JURISDICTION TO DETERMINE THE VALIDITY OF AN ACT 425 AGREEMENT

Applicable Standard of Review. Whether an administrative agency has subject matter jurisdiction is a question of law that is reviewed de novo on appeal. *Macomb Co v AFSCME Council 25 Locals 411 and 893*, 494 Mich 65, 77; 833 NW2d 225 (2013); *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). Challenges to subject matter jurisdiction can be raised at *any* time, including for the first time on appeal. *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 479 n2; 795 NW2d 797 (2010). Non-preservation is not a defense to lack of subject matter jurisdiction because the parties to an action cannot confer jurisdiction by their conduct or by their action, nor can they waive the defense by not raising it in lower proceedings. *Hillsdale County Sr Services, Inc v Hillsdale County*, 494 Mich 46, 51 n3; 832 NW2d 728 (2013).

Argument. A principle that has been *continuously* and firmly ensconced in Michigan's administrative law jurisprudence since at least the early part of the 20th century is the rule that an administrative agency has no implied powers or common law authority; any authority an agency exercises must be expressly granted by the Legislature, by way of clear and unmistakable statutory language. *See,* e.g., *Eikhoff v Detroit Charter Comm*, 176 Mich 535, 540; 142 NW 746 (1913); *Mason Co Civil Research Council v Mason Co*, 343 Mich 313, 326-327; 72 NW2d 292 (1955); *McKibbin v Mich Corp & Sec Comm*, 3269 Mich 69, 82; 119 NW2d 557 (1963); *York v Detroit (After Remand)*, 438 Mich 744, 767; 475 NW2d 346 (1991); *Czymbor's Timber, Inc v City of Saginaw*, 478 Mich 348, 356; 733 NW2d 1 (2007). The Court of Appeals summarized this same rule in *Herrick Dist Library v Library of Michigan*, 293 Mich App 571; 810 NW2d 110 (2011):

> [O]ur cases carefully limit the powers of administrative agencies to ensure that they do not abuse or make baseless expansions of the limited powers delegated to them by the Legislature. Therefore, being creations of the Legislature, they are only allowed the powers that the Legislature chooses to delegate to them through statute. *York*, 438 Mich at 767; 475 NW2d 346. Administrative agencies have no common-law powers. *McKibbin v Mich Corp & Sec Comm*, 369 Mich 69, 82; 119 NW2d 557 (1963). []

> The powers of administrative agencies are thus inherently limited. Their authority must hew to the line drawn by the Legislature. Our Supreme Court has repeatedly stressed the importance of this limitation on administrative agencies, stating that "'[t]he power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist.'" *Mason*, 343 Mich at 326-327; 72 NW2d 292 (citation omitted). Further, powers "'specifically conferred'" on an agency "'cannot be extended by inference'; . . . no other or greater power was given than that specified." *Alcona Co v Wolverine Environmental Production, Inc.*, 233 Mich App 238, 247; 590 NW2d 586 (1998), quoting *Eikhoff v Detroit Charter Comm*, 176 Mich 535, 540; 142 NW 746 (1913).
>
> The general rule in Michigan, then, is that the power and authority of an agency must be conferred by clear and unmistakable statutory language. And if a statute does explicitly grant an agency a power, that power is subject to "strict interpretation." *Mason*, 343 Mich at 326, 72 NW2d 292. An administrative agency that acts outside its statutory boundaries usurps the role of the legislature. This type of administrative overreach of course conflicts with our federal and state constitutions, which specifically indicate that "in the actual administration of the government Congress or the Legislature should exercise the legislative power...." *J.W. Hampton*, 276 U.S. at 406, 48 S. Ct. 348. As such, the role of an administrative agency terminates wherever the Legislature chooses to end it. *See York*, 438 Mich at 767, 475 NW2d 346. [*Herrick Dist Library, supra* at 582 (footnotes omitted)].

The *Casco Twp* opinion, by holding that the SBC has subject matter jurisdiction to decide the validity of Act 425 agreements, represents a stark and shocking departure from this venerable body of controlling case law. The SBC has no statutory authority to administer or apply Act 425; it has no statutory authority to conduct hearings on Act 425 agreements; it has no statutory authority to promulgate rules under Act 425; it has no statutory authority to consider whether the economic development plan of an Act 425 agreement is prudent, preferable, or advisable; and, it has no statutory authority to consider whether an Act 425 agreement satisfies the minimum criteria of the Act 425 statute. The SBC is not mentioned anywhere – not even once – in Act 425. The Legislature has thus made the decision that the SBC should have *nothing* to do with Act 425 agreements.

Yet, out of thin air, and without even a pretense of arguable statutory authority, the *Casco Twp* court decided that the SBC should have *everything* to do with Act 425 agreements. It held that the SBC should the primary arbiter of whether an Act 425 agreement satisfies the statutory criteria of Act 425 (*Casco Twp* at 399), and suggested that the SBC can invalidate an Act 425 agreement on

grounds that do not even appear in Act 425 (e.g., public opposition to annexation and interference with annexation). *Id.* at 401-403. That this conclusion was reached without even a pretense of statutory authority is made clear at pages 398-399 of the *Casco Twp* opinion, where the Court of Appeals could not identify a single provision of Act 425 that even mentions the SBC (for the obvious reason that there is no such provision), yet alone identify a provision that grants the SBC any authority over Act 425 agreements. In view of this, the Court of Appeals had to *imply*, through its "logic," that the SBC, by virtue of having jurisdiction to consider and decide annexation petitions under the State Boundary Commission Act, MCL 123.1001, *et seq*., must necessarily have the additional authority to also decide the validity of Act 425 agreements under §9 of Act 425:

> In light of the broad grant of statutory authority to the commission [under MCL 123.1001, *et seq*.] over matters relating to the establishment of boundaries and annexations, we hold that the commission had the authority and jurisdiction to decide the validity of the Act 425 agreements [under MCL 124.29]. Logic dictates that the commission had the authority to consider the validity of two [Act 425] agreements that, if valid, would have barred its authority to process, approve, deny, or revise a petition or resolution for annexation. **The commission would not otherwise have been able to perform its function of resolving the petition**. *Casco Twp* at 399. [Emphasis added].

With all due respect to the *Casco Twp* court, the above-bolded statement just isn't so. The Legislature has stated, in clear and unequivocal terms, exactly what the SBC's "function" is and how the SBC is to "resolve" an annexation petition in situations where the petition includes lands that are already subject to an Act 425 agreement that is in effect: it must reject the petition. This outcome necessarily follows from the plain language of §9 of Act 425, MCL 124.29, which states:

> While a contract under [Act 425] is in effect, another method of annexation or transfer **shall not take place** for any portion of an area transferred under the contract. MCL 124.29 [emphasis added].

"Shall not take place" – that is strong language. But the above statute is just as notable for what it doesn't say, as much as for what it does say. It does ***not*** say that "another method of annexation or transfer shall not take place *unless the SBC decides that the contract is invalid or that*

annexation would be more beneficial." [Added language in italics]. There are no exceptions to the "shall not take place" language. The Legislature certainly could have adopted exceptions, but it did not – a fact that cannot be changed by judicial legislation. *Ross v Fisher*, 352 Mich 555, 559-560; 90 NW2d 483 (1958). And so the SBC's proper "function" in a case like this was to "resolve" the TeriDee petition by rejecting it – plain and simple.

And there are no grounds for the *Casco Twp* court to have granted the SBC implied powers to adjudicate the validity of Act 425 agreements. As documented above, the general rule is that administrative agencies have no implied powers, at all. The *only* narrow exception to the general rule that has ever been recognized by the Michigan courts is that an agency may be deemed to have implied authority to adopt reasonable rules and regulations, but only in those narrow situations where rulemaking is "deemed necessary to the due and efficient exercise **of the powers expressly granted**." *Herrick Dist Library* at 574 (citing *Ranke v Corp & Securities Comm*, 317 Mich 304, 309; 26 NW2d 898 (1947) quoting *California Drive–in Restaurant Ass'n v Clark*, 22 Cal2d 287, 302; 140 P2d 657 (1943)) [emphasis added]. That exception does not apply here because the SBC has absolutely no "expressly granted" powers under Act 425, thus making it impossible to imply any additional authority therefrom. That observation notwithstanding, it is certainly not "necessary" that the SBC have any authority under Act 425. If a party desiring annexation has a legitimate concern about the validity of an Act 425 agreement covering his or her lands, that person can file an action in circuit court for the purpose of seeking a declaration of invalidity, before filing an annexation petition with the SBC. This would be proper because the courts have general jurisdiction to decide whether a contract satisfies state law. *Cruz v State Farm Ins Co*, 466 Mich 588; 648 NW2d 591 (2002). Moreover, a circuit court would not be usurping any agency powers in performing this function, inasmuch as there is no agency that is statutorily directed to review Act 425 agreements. In short, there is absolutely nothing making it necessary that the SBC have powers under Act 425 in

order to fulfill its statutory function to review annexation petitions under MCL 123.1001, *et seq*.

It appears that the *Casco Twp* court erroneously reached a different conclusion because of misdirected concerns it had about Act 425 agreements having the consequence of interfering with a property owner's desire to instead seek annexation. *Casco Twp* at 401-402. Understanding the flaw in this logic starts with the predicate recognition that no individual has a legal right to have his or her property located in a certain municipality or to have his or her property transferred into another municipality by annexation. *Midland Twp v State Boundary Comm*, 401 Mich 641, 673-74; 259 NW2d 326 (1977). But now let's juxtapose that Supreme Court holding against the *Casco Twp* opinion, and we see a very troubling dichotomy.

In that regard, the *Casco Twp* opinion approvingly cites to the circuit court's reasoning, which was that "the purpose of the [Act 425] agreement was to bind nonparties *in derogation of their rights* [and] to limit the authority of the commission . . . to annex a portion of the Townships." *Casco Twp* at 401-402 [emphasis added]. So, the underlying premise of *Casco Twp* is that individuals have "rights" to annexation, and that Act 425 agreements are invalid if they interfere with the SBC's ability to grant those "rights." This is a false narrative having two layers.

First, as stated above, this Court long ago held, in *Midland Twp*, that there are no "rights" to annexation, and so *Casco Twp* involved a situation where there were no "rights" for the courts to have been concerned with in the first instance. Second, interference with the SBC's power to annex is not a "bad" thing. To the contrary, the Legislature has decided that Michigan's public policy is just the opposite; it has expressly declared that Act 425 agreements should *always* prevail over annexation, without exception, whenever there is a conflict between the two. MCL 124.29.

But because of *Casco Twp*, our State law has been turned on its head. The SBC is now making sure that its power to annex *always* prevails over a conditional transfer agreement – just the opposite of what the Legislature intended. And the astonishing thing is that the SBC has done this

under the auspices of a statute (Act 425) for which the Legislature has not given the SBC any authority to administer. The Court should put an end to this unlawful exercise of administrative authority by reversing and vacating the SBC's decision, for lack or jurisdiction.

II. THE SBC IMPROPERLY DETERMINED THAT THE ACT 425 AGREEMENT WAS INVALID

As shown above, the SBC has no subject matter jurisdiction to consider the validity of an Act 425 Agreement. On that basis alone, reversal is required. But if the Court recognizes the *existence* of the SBC's subject matter jurisdiction over Act 425 agreements, this case nonetheless presents a situation where the SBC has unlawfully *exercised* its jurisdiction, by way of invalidating an Act 425 Agreement that satisfies the criteria of Act 425. Reversal is required on this alternative ground.

Applicable Standard of Review. Whether a contract complies with statutory criteria is a question of law, subject to de novo review on appeal. *Cruz* at 594. Similarly, an administrative agency's interpretation and application of a statute is a question of law, which is reviewed de novo on appeal. *United Parcel Service, Inc v Bureau of Safety and Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2008). Also, questions of whether an agency's decision is in violation of a statute or made in excess of its jurisdiction are questions of law, which are reviewed de novo on appeal. *Shelby Twp v State Boundary Commission*, 425 Mich 50, 52, 72-73; 387 NW2d 792 (1986).

Applicable Principles of Administrative Law. This Court has rejected the concept that any "deference" is to be given to an agency's interpretation or application of a statute, holding that all prior cases that had applied such deference had been erroneously decided. *In re Rovas* 482 Mich 90; 754 NW2d 259 (2008). An agency's interpretation is entitled to only "respectful consideration," but not deference, and it is certainly not binding on a court. *Id* at 103. Consistent with the rejection of the concept of granting "deference" to an agency's interpretation of a statute, the Court has previously held that, where an agency's interpretation of a statute conflicts with the statute's plain language, the interpretation must be rejected. *Czymbor's Timber* at 356. This is true, no matter how

long the agency might have persisted in its mistaken interpretation. *Bachman v Dep't of Treasury*, 215 Mich App 174, 182; 544 NW2d 733 (1996).

Moreover, to the extent that the courts have ever given any "deference" or "respectful consideration" to an agency's construction or application of a statute, that has been limited only to those situations involving "agency interpretations of a statute by the agency **responsible for the statute's execution**." *See*, e.g., *ADVO-Systems, Inc v Department of Treasury*, 186 Mich App 419, 426; 465 NW2d 349 (1990) [emphasis added]. In that respect, it is notable that the Legislature purposely decided not to mention the SBC anywhere in the Act 425 statute. *The SBC has not been given any statutory authority to administer or apply the Act 425 statute.* The only parties that have the authority to administer and apply the Act 425 statute are "local units," which are defined by Act 425 as including only "a city, township, or village," but not the SBC. MCL 124.21(b).

In particular, it is *only* the "local units" to an Act 425 Agreement who have the authority decide whether the statutory criteria of Act 425 justify the development and approval of a conditional transfer agreement. MCL 124.23 ("When formulating a contract under this act, **the local units** [i.e., not the SBC] shall consider the following factors . . ." [emphasis added]). The SBC has no statutory role in considering whether an Act 425 Agreement is advisable or appropriate. *Id.* And likewise, the SBC has absolutely no statutory role in considering whether the economic development project of an Act 425 Agreement is advisable or appropriate. To the contrary, what constitutes an "economic development project" has been defined by the Legislature, in plain terms. *See* MCL 124.21(a). And within that statutory definition, it is the "local units" to the Act 425 agreement – and those local units *alone* – who have been given the statutory authority and discretion to *control* the nature, scope and extent of the economic development project of an Agreement. MCL 124.22(1) (a conditional transfer of property "for the purpose of an economic development project . . . shall be **controlled** by a written contract agreed to **by the affected local units**." [Emphasis added]).

These observations about the SBC's lack of authority under Act 425 are consistent with the well-established rule that an agency, including the SBC, has no implied powers, and is strictly limited to exercising only those powers expressly granted by statute. *Eikhoff*; *Mason Co*; *McKibbin; York*; *Czymbor's Timber*. Thus, as a matter of well-established principles of Michigan administrative law, the SBC has no authority to interpret or apply Act 425. Likewise, it has no authority to adjudicate the wisdom or desirability of an Act 425 agreement, nor to adjudicate the wisdom, desirability or effectiveness of an economic development project developed thereunder.

Applicable Principles of Contract Interpretation. Under MCL 124.30, an Act 425 agreement is prima facie valid, and so the burden was on the City and TeriDee to show that the Townships' Agreement is invalid. *Casco Twp, supra* at 402. There are certain bedrock principles of contract interpretation that apply in this context. When faced with a claim that a contract is in conflict with a statute, a court is obligated to construe the contract, where reasonably possible, as being in harmony with the statute. *Cruz* at 599. A court is to presume that the parties intended to enter a valid and enforceable contract. *Id*. And, to give effect to that presumption, the court is to prefer a construction that renders the contract legal and enforceable. *Id.* Every presumption is allowed in favor of a legal purpose, and a contract will not be adjudicated to be invalid when it is capable of a construction that will make it valid. *Stillman v Goldfarb*, 172 Mich App 231, 239; 431 NW2d 247 (1988). This is not just the Michigan rule of law; it is the same rule applied by the US Supreme Court (*Walsh v Schlecht*, 429 US 401, 408 (1977), and also by state courts across the county. *See* 17A Am Jur 2d, Contracts, §340. *See* also, *Restatement (2nd) of Contracts*, §203(a).

A. The SBC's Decision To Invalidate The Agreement Was Based On An Unlawful Exercise Of Its Statutory Authority And Jurisdiction

Despite the above rules, the SBC set sail on a course directly against the legal tide, and instead indulged in every possible presumption that the Townships' Agreement is invalid. The SBC then compounded this legal error by invalidating the Agreement on grounds that appear nowhere in

Act 425. In order to understand why the SBC veered so widely outside of the confines of Act 425, it is necessary to again consider the underlying genesis of the problem: the *Casco Twp* opinion. In particular, it is the *dictum* of *Casco Twp* that has caused great mischief.

As explained above, the actual *holding* of *Casco Twp* is very narrow. It held, as a matter of first impression, that the SBC has subject matter jurisdiction to consider whether an Act 425 agreement satisfies the minimum criteria of Act 425. *Casco Twp* at 398. The easiest way to understand that this is the limited holding of *Casco Twp* is to start with the underlying SBC decision in that same case. Appendix, 1364a-1370a.

Contrary to what now seems to be the "popular" belief, the factual findings that the SBC made to support its decision in *Casco Twp* had absolutely nothing to do with (a) the existence or viability of an economic development project, (b) the degree to which either township received a financial benefit (degree of revenue sharing), (c) public opposition to annexation, (d) the ability to effectively or economically provide township utilities, or (e) the timing of the agreements. In other words, not a single one of the ostensible "reasons" the SBC invalidated the Townships' Agreement in this case finds any support in the SBC's own *Casco Twp* decision.

Instead, the *only* factual finding that the SBC made in support of its decision to invalidate the *Casco Twp* agreement was that a transfer of land had not actually taken place, such that there was no Act 425 agreement actually "in effect" that would preclude the SBC from exercising jurisdiction over the competing annexation petition. The SBC's own *Casco Twp* decision explains this:

> 4. "[]The fact that the agreements between Lenox Township and Casco and Columbus Townships are under Act 425 is pertinent because Section 9 states, 'While a contract under this act is in effect, another method of annexation or transfer shall not take place for any portion of an area transferred under the contract.'
>
> 5. "The words 'another method of annexation or transfer' imply that an annexation or transfer of land has been made under the act. *To make all the provisions of the act operational, a transfer of land from one jurisdiction to another, under this agreement, must have taken place. In the absence of such*

a transfer, the Commission's authority to determine the reasonableness of a proposal for annexing land within an Act 425 area is not restricted.

6. "*A transfer of land has not occurred in this case*. The parties did not provide evidence of such transfer, which minimally could have included a showing of a transfer to Lenox Township of property tax records and voting records of any residents of the Act 425 area.

7. "Therefore, the agreements between Casco, Columbus, and Lenox Townships do not preclude the Commission from acting on this matter." [*Id*., 1367a-1368a].

Thus, when the *Casco Twp* case went up on appeal, the *only* SBC factual finding that could have *potentially* been presented for appellate review, insofar as the validity of the Act 425 agreements was concerned, was the finding that "[a] transfer of land has not occurred." However, the appellant-townships did not challenge even that one factual finding, and so conceded that a transfer had not actually occurred. *Casco Twp* at 402 ("The townships do not dispute the specific factual findings underlying the commission's conclusions."). Instead, the townships challenged only whether the SBC had jurisdiction, at all, to determine the validity of an Act 425 Agreement. *Id*. at 396. Thus, after the Court of Appeals had decided this legal issue against the townships, by finding that the SBC had jurisdiction (*id*. at 397-399), the appeal was over. The only *legal* issue that had actually been raised on appeal was decided in a dispositive way. Anything else the Court of Appeals said after that point was irrelevant obiter dictum.

Driving this point home even further is the fact that the Court of Appeals could not even discern the factual reason why the SBC had invalidated the agreements in the first place. *Id*. at 402 ("[T]he precise reasoning behind the commission's disregard of the Act 425 agreements is not entirely clear."). As a result, the Court of Appeals could only assume what the SBC had "*apparently* concluded." *Id*. [emphasis added]. The Court of Appeals had to speculate that the SBC had "apparently" deemed the agreements to be a "subterfuge intended to preclude the commission's jurisdiction." *Id*. This was, indeed, nothing but speculation about a *possible* basis for the SBC's

decision, because it is undisputed that the SBC made no such finding. Appendix, 1367a-1368a.

Thus, what the closing part of the *Casco Twp* decision represents (*Casco Twp* at 400-403) is an improvident judicial foray into speculating what an administrative agency *might have concluded* as a factual basis for reaching a decision. This observation applies to *all* of the Court of Appeals' closing comments about (a) the agreements being an "an attempt to avoid annexation," (b) the existence of public petitions in "opposition to the annexation," and (c) the agreements only "vaguely contemplat[ing] a plan of development sometime in the future." *Id.* The SBC's own *Casco Twp* decision did not mention a single one of these supposed factual findings, and so the Court of Appeals had to essentially create them *de novo*. To some degree, this de novo attempt to find justification for the SBC's decision is understandable[7], but it is nonetheless dictum, and it was ultimately improper for the Court of Appeals to have done this. *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich. 116, 124; 223 NW2d 283 (1974) (courts must not "invade the province of exclusive administrative fact-finding."). A court should not even be discussing the "substantial evidence test" in the context of an appeal where an agency's factual findings are not being disputed because that test applies *only* to agency fact finding. *Russo v State Dep't of Licensing and Regulation*, 119 Mich App 624, 630-631; 326 NW2d 583 (1982). *See* also, LeDuc, Michigan Administrative Law (2014 ed.), §9:15, p. 632.

Principles of appropriate judicial restraint aside, the inescapable conclusion is that the latter part of the *Casco Twp* decision is nothing but obiter dictum. The only "holding" of that case is that the SBC has jurisdiction to consider if "an [Act 425] agreement fulfills the statutory criteria" and thus "bars the commission from entertaining a petition for annexation." *Casco Twp* at 398-399. And the *Casco Twp* decision recognizes that the SBC's inquiry is very narrow in this respect,

[7] After all, the natural judicial impulse is to search for a valid factual basis for a decision. But that impulse must be restrained in situations where, like in *Casco Twp*, the supposed reasons are not even being appealed.

holding that the statutory bar to the SBC's consideration of an annexation petition (MCL 124.29) is effective if "an [Act 425] agreement fulfills the statutory criteria" rather than being a "fictional agreement intended *only* to deprive the commission of jurisdiction." *Id.*, 398-399 [emphasis added].

The word "only" is emphasized in the above quote to make a very important point, to wit, that an Act 425 Agreement is invalid if its "only" intended purpose is to deprive the SBC of jurisdiction. In that regard, the Legislature has expressly decided that *all* Act 425 agreements are intended to deprive the SBC of jurisdiction over annexation petitions, as provided by the plain language of MCL 124.29. Neither a court nor an administrative agency has the option of interfering with that Legislative policy decision, because "making public policy is the province of the Legislature, not the courts." *Myers v City of Portage*, 304 Mich App 637, 644; 848 NW2d 200 (2014) (citing *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012) (holding that "[o]ur judicial role precludes imposing different policy choices than those selected by the Legislature"); *see* also, *Chrisdiana v Dept of Community Health*, 278 Mich App 685, 689; 754 NW2d 533 (2008) ("agency policy is . . . required to . . . comply with the underlying legislative intent.").

The necessary consequence of this is that, if an Act 425 agreement satisfies the statutory criteria of Act 425, it is necessarily valid, *as a matter of law*, because it does not "only" deprive the SBC of jurisdiction; it also minimally includes an economic development project. And because the question of whether a contract complies with a statute is a question of law (*Cruz* at 594), it is not a question within the province of agency fact finding; it is a matter of comparing the plain terms of the contract to the plain requirements of the statute with which it must comply (*id.* at 594-598).

But this is exactly where the SBC has run amuck with the dictum of *Casco Twp*. The SBC no longer limits its review of an Act 425 agreement to a simple determination of whether the plain terms of an agreement comply with the plain terms of the Act 425 statute. It has instead seized on the dictum of *Casco Twp* for the purpose of invalidating *any* Act 425 Agreement that will interfere

with the SBC's annexation powers, based on irrelevant factors (i.e., factors not appearing in Act 425) such as (a) public opposition to annexation (b) a subjective analysis of whether the Agreement's specified economic development plan would be more or less desirable, as compared to the economic development contemplated by annexation, (c) whether the extent of revenue sharing between the parties to the Agreement is "good" or "bad," and (d) the timing of the Agreement's adoption.

These unlawful practices were on full and prominent display in this case. This will become readily apparent to the Court as it reviews (a) the plain terms of the Act 425 statute (subsection B, below), (b) the plain terms of the Townships' Agreement (subsections C and D, below), and (c) the individual bases on which the SBC invalidated the Agreement (subsection E, below), each of which constitutes an unlawful exercise of the SBC's statutory authority and jurisdiction.

B. The Five Mandatory Criteria of Act 425

Act 425 identifies only five discrete criteria that a conditional transfer agreement must satisfy, in order to fulfill the statute. First, Act 425 requires that a conditional transfer agreement be for the "purpose of an economic development project." MCL 124.22(1). In that regard, Act 425 defines "economic development project," in pertinent part, as follows:

> Land and existing or ***planned*** **improvements suitable for use by** an industrial or **commercial enterprise, or housing development**, **or the protection of the environment, including, but not limited to, groundwater or surface water.** Economic development project includes . . . **housing development incidental to an industrial or commercial enterprise** . . . MCL 124.21(a) [emphasis added].

The only other criteria that must be fulfilled by a conditional transfer agreement are identified at Section 7 of Act 425, MCL 124.27. Section 7 of Act 425 states as follows:

> A contract under this act shall provide for the following:
>
> (a) The length of the contract.
>
> (b) Specific authorization for the sharing of taxes and any other revenues designated by the local units. The manner and extent to which the taxes and other revenues are shared shall be specifically provided for in the contract.

(c) Methods by which a participating local unit may enforce the contract including, but not limited to, return of the transferred area to the local unit from which the area was transferred before the expiration date of the contract.

(d) Which local unit has jurisdiction over the transferred area upon the expiration, termination, or nonrenewal of the contract. MCL 124.27.

It is undisputed that the Townships' Agreement satisfies the criteria stated at Section 7(a), (c) and (d) of Act 425. Appendix, 744a (Art. I, §§ 14-16, 17(a)); and Appendix, 747a (Art. III). The SBC did not find any noncompliance with these particular criteria, and Appellees did not argue noncompliance with these criteria. Accordingly, the only issues presented for review are:

- Whether the Agreement includes an "economic development project," and,
- Does the Agreement include specific authorization for the sharing of taxes and any other revenues designated by the local units.

As demonstrated below, the Agreement satisfies these statutory criteria, and so is valid.

C. The Agreement Includes An Economic Development Project

There is no doubt that the "planned improvements" authorized by the Act 425 Agreement meet the statutory definition of an "economic development project." Under the Agreement, Haring water and wastewater services are to be extended to the Transferred Area. *Id*., 728a-729a (Art I, §4(a)). In addition, the Agreement also provides that the owners of the undeveloped portion of the Transferred Area may seek rezoning to a mixed-use commercial/residential PUD district, to allow a limited amount of high-quality, commercial development, nearby to the US-131/M-55 intersection, while still being protective of the surrounding residential populations by requiring buffering zones of 10% open space and additional residential use for the balance of the developed territory. *Id*., 728a (Art. I, §3). Each of these two aspects of the Agreement constitutes an economic development project under Act 425, as shown below.

1. Extension of Haring Sewer and Water Service

It cannot be questioned that the provision of public sewer and water services protects

"groundwater or surface water" and supports "commercial enterprise," as Act 425 requires, and that is exactly what the Agreement does. Moreover, the provision of sewer and water services to the Transferred Area is not contingent on some speculative future event, other than TeriDee's cooperation. The Clam Lake and Haring Boards each adopted, on October 9, 2013 and October 14, 2013, respectively, a certified resolution of intent to make the sewer/water improvements and extensions from Haring that are necessary to serve the Transferred Area, pursuant to the terms of a development agreement between the Townships and TeriDee. *Id*., 1206a-1212a. Further, the Haring WWTP has already been constructed, is now available for service (*id*., 1665a-1806a), and has capacity to serve the Transferred Area (*id*., 1215a-1217a). If TeriDee had cooperated by constructing the needed sewer and water lines in the interim (i.e., since the time the Agreement was entered), its property could have already had sewer and water service nearly a year ago.[8] *Id*., 1215a-1217a; 1517a-1521a.

As an additional matter, it is useful to point out that the extension of Haring utility services to Clam Lake is something that the Townships have been working towards for several years. The Agreement represents the culmination of these long-established plans, now made feasible by the fact that the Haring WWTP is now in service. This is *not* a fictional scheme that the Townships have recently developed for the purpose of interfering with the SBC's jurisdiction, despite what the City and TeriDee argued during the SBC proceedings. To demonstrate this, the Clam Lake Supervisor, Dale Rosser, filed an affidavit in the SBC proceedings (which was *unopposed*), setting forth the historical events that have led Clam Lake and Haring to enter an Act 425 Agreement for the sharing of utility services. *Id*., 1508a-1510a. Supervisor Rosser's affidavit establishes that the Townships have been working together since at least 2011, with the cooperative services of the same

[8] By way of comparison, City utility services have *still* not been extended to the TeriDee property, to this date. Thus, no one can be heard to complain that the extension of Haring utilities was somehow less feasible or less timely than the extension of City utilities.

engineering firm, to share sewer services. *Id*. Thus, the Act 425 Agreement is not a hastily put together or illusory plan for sharing utilities; it represents the fruition of a long-established plan.

And there is good reason why the Townships have been working so diligently, for so long, to find a way to share utilities. For decades, the City has been using its water and sewer systems as a means to control the Townships. Specifically, the City has adopted and implemented a policy by which is will not extend City water or sewer services to *any* township lands unless the served lands are permanently added to the City, so that the City can tax those lands at its much higher millage rate (750% higher). *Id*., 1191a-1193a. In other words, insofar as utility sharing is concerned, the City has rejected the concept of regional *cooperation* in favor of a policy that demands regional *capitulation*. In the face of this policy, the Townships have been struggling for years to find a feasible method to share utilities, so as to release themselves from the City's grips, and so as to be able to finally exert some measure of control over their own development destinies.

And so along came this golden opportunity for the Townships to share utilities, where (a) the Haring WWTP is now a reality, (b) Haring is actively looking for new sewer customers for its WWTP, (c) a person owning property right on the Townships' shared border is interested in development and wants utilities, and (d) that same property is situated directly within the Townships' designated utility-sharing corridor. The circumstances could not be better for the Townships to enter an Act 425 Agreement, so as to foster economic development while at the same time finally releasing themselves from the City's grips. In this context, for anyone to say that the Townships' agreement to share utilities is not real, is to engage in pure fantasy.

2. Mixed-Use Commercial/Residential Development

The mixed-use commercial/residential development that is allowed by the Agreement also constitutes an economic development project. The Legislature has decided that either "commercial enterprise, or housing development" constitute a valid economic development project. MCL

124.21(a). And once again, that is exactly what the Agreement allows: it allows the owners of the Transferred Area to apply for mixed-use commercial/residential housing development.

And even though it is not relevant to the Agreements' statutory compliance, the Townships point out that there is nothing in the record to suggest that the development standards of the Agreement would fail to promote economic development. To the contrary, the undisputed record evidence shows that the City, the County and the Townships have *always* planned for the Transferred Area to be developed using the exact same type of design standards that are reflected in the provisions of the Agreement, and that these standards allow reasonable development.

First, with regard to the Agreement's restriction on the percentage of commercial use, this is consistent with the existing County FR zoning for the Transferred Area. Appendix, 1338a-1347a. The FR District is intended primarily for residential housing, but does allow a limited amount of commercial uses (convenience stores, motels and lodging, restaurants, retail, etc.), as a conditional use or special use. *Id*. The restriction on percentage of commercial use is also consistent with the City's own land use plans for the US-131-M-55 intersection. The City's own 1994 Long Range Comprehensive Plan states that commercial use should be restricted at the US-131/M-55 interchange, and encourages the County and Haring to implement this same strategy on their side of the highway interchange. *Id*., 1434a-1436a. Cadillac continued the same land use plan in its most recent Master Plan, which again counseled against unrestricted commercialization of the US-131/M-55 intersection, so that the City's urban core would not be harmed. *Id*., 1005a.

Second, with regard to the design standards of the Agreement, the Townships refer the Court to the *Cadillac Area Corridor Study* (*id*., 1544a-1598a), which is a planning document jointly prepared by the City, Haring and Clam Lake in 1999. The purpose of the *Corridor Study* was to "examine enhancement needs and opportunities for the future US-131 Business Route, associated M-55 and Boon Road segments, *and the new freeway interchanges*." *Id*., 1548a [emphasis added]. The

Corridor Study is intended to provide "design concepts and standards which can be applied to future development and redevelopment opportunities occurring along . . . *the new interchanges*." *Id.* [emphasis added].

With regard to "interchange enhancement practices," the *Corridor Study* makes a number of specific recommendations that are of particular relevance when the Court considers the design standards of the Act 425 Agreement. In that regard, the Townships submitted to the SBC a list of some of the principal recommendations of the *Corridor Study*, followed by an identification of the parallel development provision(s) that have been incorporated into the Act 425 Agreement, for the purpose of implementing those particular recommendations. *Id*., 1600a-1603a. As this comparison document demonstrates, nearly every development provision of the Agreement is founded upon a specific recommendation of the *Corridor Study*. *Id*. The *Corridor Study* is a land use and planning document that was prepared by and specifically endorsed by the City and Townships, for implementation at the US-131 interchanges, including at the Exit 180 interchange that is at issue in these proceedings. Notably, the City has recommended, in its Master Plan, that these same type of design features be incorporated into commercial development, as they relate to building setbacks and lots size; access management; driveway spacing and location; parking and circulation; landscaping and signs; etc. *Id*., 1003a-1004a; 1006a-1009a. Thus, these standards reflect the exact same type of standards that the City, Haring and Clam Lake all jointly agreed should be imposed on the Transferred Area.

Further, the undisputed record evidence shows that the development standards of the Act 425 Agreement have allowed reasonable, quality commercial development to occur, in other areas where they have been adopted. The same type of development standards are in effect (with some minor variation) in several communities across Michigan, including, for example, in Grand Haven Charter Township, Michigan. *Id*., 1252a-1277a. The Townships submitted photos of development that has

occurred in Grand Haven Township, in the areas where these same standards apply. *Id*., 1279a-1292a. These photos demonstrate that quality commercial development can occur – and *has* occurred – under these regulations.

And finally, the undisputed record evidence shows that the type of development that is allowed by these standards is consistent with the quality development that has already occurred in the nearby Clam Lake DDA District. The Townships submitted to the SBC the 2008 Master Plan Update for the Clam Lake DDA, which includes a number of photographs that depict the quality of commercial development that has already occurred in the DDA. *Id*., 1405a-1411a. As the Court will see, the quality of the commercial buildings in the DDA District is very similar to that which has occurred in the Grand Haven Township Overlay District. The undisputed evidence demonstrates, therefore, that the Agreement will result in commercial development that is of the same or comparable quality, to what already exists in the same vicinity, in Clam Lake.

This detailed information about the reasonableness of the Agreement's development standards is superfluous, for the reason that the Agreement's specified economic development project satisfies Act 425, on its face. The Townships nonetheless provide this information to emphasize the great mischief that the *Casco Twp* dictum has perpetuated. The Court is now viewing a situation where the SBC had before it *undisputed* evidence showing that the development standards of the Agreement are consistent with the City, County and Township land use plans, and otherwise allow reasonable, quality development to occur. But the SBC members (none of whom are professional land use planners) ignorantly said this "Beverly Hills" plan would "not promote economic development," simply because they would subjectively prefer that TeriDee be permitted to engage in unrestricted "big box" commercial development. *Id*., 319a-320a.

This has to stop. The SBC has absolutely no authority to adjudicate the wisdom or desirability of an Agreement's economic development project. This Legislature has instead decided

that the economic development project is to be "*controlled* by a written contract agreed to by the affected local units." MCL 124.22(1) [emphasis added]. Reversal is required, to prevent the SBC from continuing to abuse its authority.

D. The Agreement Includes Authorization For Revenue Sharing

As noted above, the only other criterion of Act 425 that was implicated by the SBC's decision is Section 7(b) of Act 425, which requires that a conditional transfer agreement include "[s]pecific authorization for the sharing of taxes and any other revenues designated by the local units." MCL 124.27(b). The SBC obliquely addressed this requirement, concluding that the Agreement is invalid because Clam Lake does not receive a financial benefit under the Agreement (i.e., Clam Lake shares 100% of the property tax revenue from the Transferred Area with Haring, rather than sharing in some different proportion). Appendix, 13a (¶6b). This particular finding is without logical foundation, and is contrary to the plain language of Act 425.

This finding was offered to support the SBC's determination that the Agreement is "not being used to promote economic development." *Id*., 13a (¶6). But there is no logical connection between the two. Whether an economic development project exists is a standalone consideration that is not affected by the presence, lack of, or degree of revenue sharing. They are totally separate concepts. If the Townships entered an Act 425 agreement that allowed, for example, extension of public sewer service and the concurrent construction of a widget factory, that would be, *ipso facto*, an economic development project, without any consideration of revenue sharing. One has nothing to do with the other.

More importantly, a municipal decision about the degree of revenue sharing under an Act 425 agreement is a purely discretionary decision that is non-justiciable. Which is to say that Act 425 provides no standards by which to gauge how much revenue sharing should or should not occur. Parties to an Act 425 agreement must only provide in their agreement the *authorization* to share

revenue, but they are not required to share to any particular degree, or to any maximum or minimum degree. *See* MCL 124.27(b) (giving "local units" the sole statutory authority to determine "the extent" of revenue sharing).

As such, there is no court, no judge, and certainly no administrative agency, that has any legal authority to invalidate an Act 425 agreement on the basis of there being too little or too much revenue sharing. This is a matter which the Legislature has delegated to the sole discretion of the municipal parties to an Act 425 agreement, and so judicial or administrative review is precluded, as this would violate the separation of powers doctrine. *See Warda v City Council of City of Flushing*, 472 Mich 326, 339-340; 696 NW2d 671 (2005). All that a valid Agreement must do is to include "authorization" for revenue sharing, and it is undisputed that the Townships' Agreement includes such authorization. Appendix, 742a (Art. I, §7) (sharing property tax revenue with Haring).

E. The SBC Decision Violates The Plain Language of Act 425

Because the Townships' 2013 Agreement remedied all of the supposed deficiencies that the SBC had identified in the Townships' 2011 Agreement, the SBC was forced to invent new reasons to invalidate the 2013 Agreement. As demonstrated below, these reasons are unlawful because they find no support in the provisions of Act 425, and, in some instances, are demonstrably false. Before considering the Townships' arguments on these points, it is useful to first clarify the precise nature of the Township's challenge to the SBC's extra-jurisdictional *exercise* of its authority, because it appears that this distinction was misunderstood by the circuit court. *Id*., 134a-137a.

A distinction needs to be made between the *existence* of jurisdiction, and the *exercise* of jurisdiction. A challenge to the existence of jurisdiction (Argument I) focuses on the power of an agency or court to act, at all, over the subject matter of a case or appeal. However, once jurisdiction of the subject matter and the parties is established, any error in the determination of "questions of law . . . upon which jurisdiction in the particular case depends is error in the exercise of jurisdiction."

See Altman v Nelson, 197 Mich App 467, 472–473; 495 NW2d 826 (1992).

In that regard, the SBC argued below that it "absolutely possesses the statutory authority and jurisdiction to decide the validity of the Act 425 Agreement at issue." That position is supported by the holding of *Casco Twp*, but that position is materially misdirected when considering this particular aspect of the Townships' argument, concerning the SBC's *exercise* of jurisdiction (Argument II). What the Townships are now arguing is that, assuming the *existence* of SBC jurisdiction, the SBC nonetheless erroneously *exercised* its jurisdiction in this case by invalidating the Agreement on grounds that do not appear in the plain text of Act 425, or upon grounds which are otherwise not within the SBC's scope of authority. These type of *legal* errors are not subject to review under the "substantial evidence" test, for the reason that they are not based on disputed factual findings. Instead, they are legal questions, subject to de novo review. *Shelby Twp, supra*.

With this predicate and proper understanding of the *legal* question presented for review, the Court can then examine the SBC's proffered reasons for invalidation of the Agreement. Those five reasons are stated at ¶6a-6e of the SBC Decision (Appendix, 13a-14a), each of which was offered in support of the finding that the Agreement "was not being used to promote economic development." The circuit court should have rejected each of those reasons, as being an unlawful *exercise* of the SBC's statutory authority and jurisdiction; the circuit court should not have been applying the substantial evidence test to review these *legal* errors. *Id*., 137a-139a.

1. Viability of Economic Development Project

In ¶6a of the SBC Decision, the SBC concludes that the economic development project is "not believed . . . to be viable." The only factual finding given for this "belief," however, is that TeriDee was not consulted about the project, before the Agreement was signed. There is no factual dispute about this "finding" for the reason that the Townships admit that they did not meet with TeriDee before executing the Agreement. The Townships instead consulted with TeriDee *after* the

Agreement was signed, concerning the modifications that TeriDee wanted to make to the design standards. *Id*., 1296a-1310a. And on that point, it is undisputed that modifications were made in direct response to some of TeriDee's concerns. *Id*. *See* also, *id*., 1649a-1663a. Absent a dispute of fact on this point, the substantial evidence test is plainly inapplicable.

The problem, however, lies not in the factual finding itself, but rather, lies in the SBC's erroneous belief that lack of a prior meeting with the land owner constitutes a legal ground on which to invalidate an Act 425 Agreement. Nowhere in the Act 425 statute does it state that the local units must first meet with the property owner before entering a conditional transfer agreement. The SBC invented this requirement out of thin air. This was an erroneous *exercise* of jurisdiction for the reason that *Casco Twp* plainly holds that the SBC's only function in this type of case was to decide whether the Townships' Agreement "fulfills the statutory criteria" of Act 425. *Casco Twp* at 398-399. A pre-meeting with the property owner is not one of the "statutory criteria," and is therefore an issue that is completely outside the SBC's statutory authority and jurisdiction.

2. Financial Benefit to Clam Lake.

In ¶6b of the SBC Decision, the SBC concluded that the Agreement is invalid because Clam Lake does not receive a financial benefit under the Agreement. The Townships have already explained above, in Argument Section II.D (pp. 32-33) why this particular conclusion is illogical and contrary to the plain language of Act 425. To elaborate, however, this is just another example of the SBC exercising extra-jurisdictional authority to reach a demonstrably false conclusion.

In that regard, the Townships have no quarrel with the position that an Act 425 agreement must include "authorization" for revenue sharing, because that is an express statutory requirement of MCL 124.27(b). But that is to be distinguished from the SBC's erroneous *exercise* of jurisdiction in this case, whereby it now believes that it has the authority to adjudicate "how much" revenue sharing is appropriate under any given agreement. As the Townships have already demonstrated, the *extent*

of revenue sharing is a non-justiciable question under MCL 124.27(b), for the reason that this question is statutorily committed to the unfettered discretion of the local units who are parties to an agreement. *See* MCL 124.27(b).

In this respect, Clam Lake, as the pre-Agreement recipient of *all* revenue generated from the Transferred Area, decided to share all property tax revenue generated from the Transferred Area with Haring, as specifically authorized under Art. I, §7 of the Agreement. Appendix, 742a (Art. I, §7) (transferring all property tax revenue to Haring). This was done because Haring, in return, is required to provide "all" governmental services to the Transferred Area – a fair exchange.[9] In addition, because Haring will be financially benefitted by the extension of Haring utilities to the Transferred Area (i.e., connection fees and other revenue will be generated from new Haring users of the same lines), the Townships have agreed that, when the utility extensions occur, Haring will share that revenue stream to a degree to be determined when financial arrangements for the extensions have been finalized, as provided in Art. II of the Agreement. *Id*., 747a (Art. II). The SBC might not think this is a fair or reasonable exchange of revenue streams, but that is irrelevant. The SBC is without authority to *exercise* its jurisdiction so as to adjudicate the wisdom of *the extent* of revenue sharing to which the local units have agreed, in their own discretion.

3. The E-Mail Correspondence

Little more needs to be said about the ludicrous nature of the SBC's finding about the supposedly "incriminating" e-mails. *Id*., 13a-14a (¶¶6c and 6e). It is an absurd notion that the uninformed personal opinions of one neighborhood gadfly – which were communicated to only two of the 12 Haring and Clam Lake Board members – can be attributed to every Board member and used to impugn their motives. It is true that the City and TeriDee were quite successful in their

[9] The SBC has never been able to offer any argument to justify its position that the transferor unit cannot agree to share all of the property tax revenue. The SBC simply made up this prohibition, out of thin air.

efforts to whip the SBC members into a hysterical frenzy over these e-mails, by mischaracterizing their contents (i.e., by falsely claiming they were "exchanged" "between" Board members). Appendix, 1823a; 1866a. However, in a neutral, detached, judicial forum, these e-mails should get the exact attention they deserve: nothing. But more to the point, legally speaking, there is absolutely nothing in the plain text of Act 425 to suggest that an Act 425 Agreement is invalid if members of the public support it in writing, and actively oppose the alternative of annexation. The SBC has simply made this up out of thin air, as a reason for ignoring a valid Act 425 Agreement. This is a glaring example of the precise type of mischief that the dictum of *Casco Twp* has perpetuated.

4. Effective and Economic Provision of Sewer and Water

In ¶6d of the SBC Decision, the SBC questions whether Haring can "effectively and economically" provide sewer and water services to the Transferred Area. *Id*., 13a (¶6d). With regard to the "effective" component, this represents an egregious abuse of the SBC's jurisdiction. With regard to the "economic" component, the SBC was being purposefully obtuse about the undisputed facts, as well as acting extra-jurisdictionally. Both points are addressed below.

a. "Effectively" Provide Services

The SBC has no jurisdiction to adjudicate the effectiveness of plans or studies for public water systems. This is a matter within the sole and exclusive jurisdiction of the Michigan Department of Environmental Quality ("MDEQ"), under §3 of the Safe Drinking Water Act, 1976 PA 399, as amended, MCL 325.1001, *et seq*. Likewise, the SBC has no jurisdiction to approve or reject proposed plans for extensions of sewer systems, on grounds of effectiveness or otherwise. This is within the sole and exclusive jurisdiction of the MDEQ, under §2 of Part 41 of the Natural Resources and Environmental Protection Act, MCL 324.4101, *et seq.*

Within that correct legal context, the SBC's stated concern about "adequate water pressure in the event of a fire" is a particularly egregious abuse of its jurisdiction. The MDEQ has already

determined that the Haring water system will meet all flow and pressure requirements to serve the Transferred Area, and the SBC certainly does not have the authority to reverse that determination. On that point, the MDEQ has, in fact, reviewed and approved the Water System Reliability Study for Haring. Appendix, 1917a-1920a. Importantly, that report includes the same findings that were presented to the SBC in these proceedings, which demonstrate that the Haring water system will be able to supply a fire flow of 858.15 gpm to the Transferred Area, while maintaining a residual system pressure of 20 psi, which professional engineers certified as meeting MDEQ requirements and needed fire flows. *Id.*, 1518a-1519a; 1523a-1529a. The MDEQ agrees with these conclusions, as stated in its January 9, 2014 letter that approved the Water Reliability Study, including the modeling results for the Transferred Area. *Id.*, 1920a. ("DEQ staff has reviewed the Study . . . and concurs with the findings").

The SBC has no jurisdiction to review the MDEQ's decisions on these types of matters. Nor does the SBC have jurisdiction to consider the effectiveness water systems, *at all*, even if the MDEQ had not already weighed-in on the subject. But nonetheless, having been emboldened by the erroneous dictum of *Casco Twp*, the SBC Chairperson, Dennis Schornack, decided that *he* has jurisdiction to consider the effectiveness of public water systems. He rejected the MDEQ-approved opinions of the professional engineers who had demonstrated that Haring water would be provided to the Transferred Area with adequate pressure and fire flow. He stated at the adjudicative session:

> "I'm pretty well convinced that building a wastewater treatment plant five miles away and extending a – or three miles away, however, far it is and then extending this long dead-end pipe, which from my public health background, I'm not even sure that works, okay. 'Cause I'm not sure you can sustain the pressure, especially during a fire event." *Id.*, 328a-329a.

Mr. Schornack has no relevant "public health background." He is a career political advisor who happens to have a Master's in public health *administration*. He has never participated in the construction of a public water system, and so has no competent opinion to offer on the subject. His

arrogance is inexcusable. And his arrogance unfortunately continued on the subject of the Haring WWTP. At the adjudicative session, he made the outrageous comment that the Haring WWTP is:

> "[P]otentially fictional . . . No bonds have been issued or anything. There's no engineering studies. We don't even know if they've got the right-of-way between, okay. *And I don't really need any comments to correct any misapprehension of facts here*." *Id*., 329a [emphasis added].[10]

This level of purposeful ignorance is inexcusable. Mr. Schornack had evidence directly before him showing that every one of his statements was demonstrably false. The Townships had filed documents with the SBC, on March 27, 2014 (which are unopposed), on the status of the Haring WWTP, showing that it (a) was fully financed and all bonds were issued, (b) was fully approved by all agencies, (c) had obtained all needed permits, and (d) was on-schedule to be available for service by June 30, 2015. *Id*., 1665a-1806a. The WWTP was already under construction before the SBC adopted its final report. *Id*., 355a-356a; 1892a-1895a.

Could there be a better example of the mischief the *Casco Twp* dictum has perpetuated? Our State now has untrained political appointees pretending to be professional engineers, so as to overrule the MDEQ on matters relating to the effectiveness of public sewer and water systems. The Court should reverse, so as reign-in the SBC's extra-jurisdictional conduct.

b. "Economically" Provide Services

As a threshold matter – when considering the cost of utilities – it is important to reinforce the point that the cost differential between extending Haring and City utilities should have been irrelevant to the SBC, in the context of these proceedings. This is because Act 425 requires only that an Act 425 Agreement implement **an** economic development project on the Transferred Area – *not* the most cost-effective one, and *not* the one that the SBC might subjectively prefer. The SBC would have to re-write Act 425 to achieve a different result, which, of course, it cannot do. *See People v*

[10] Mr. Schornack made the italicized statement in response to Township representatives, who had attempted to interject at this point, for the purpose of telling Mr. Schornack that he was completely incorrect. Clearly, he was not going to let any facts get in the way of his pre-ordained decision to invalidate the Agreement.

Burton, 252 Mich App 130, 135; 651 NW2d 143 (2002).

That said, the Townships once again demonstrated good faith by showing that Haring utilities are the most economical option for serving the Transferred Area. The Townships demonstrated this with a cost study that was submitted to the SBC. Appendix, 1349a-1353a. The Townships' cost study takes into account the additional cost of City taxes, which are 750% *higher* than Haring property taxes. This is entirely proper because the City has adopted a policy document expressly providing that the full cost that must be paid for City sewer and water services is the service fees *plus* City property taxes. *Id*., 1191a-1193a. Accordingly, to accurately compare the true cost of providing City utility services vs. Haring utility services to the Transferred Area, one must account for the huge additional tax burden on the property that necessarily accompanies City services. When this is correctly done, the true cost of providing Haring utility services to the Transferred Area is actually $163,420 *less* expensive on a 10-year basis. *Id*., 1351a. Thereafter (i.e., after the tenth year), the disparity would grow by about $300,946/year, such that it would become increasingly more economical to rely on Haring utility services, as compared to City services. *Id.*, 1349a.[11]

This detailed cost-study information is superfluous, for the reason that the SBC has no statutory authority to adjudicate the desirability of a proposed economic development project under Act 425, based on whether there might be more or less expensive options for utilities. But, once again, the Townships present this information to demonstrate the mischief being created by the *Casco Twp* dictum. The SBC is using that dictum to justify its decision to ignore an Agreement's valid plan for economically extending township utilities, just because that option would not suit the narrow financial interests of one real estate speculator (TeriDee) who wants to sell its property immediately. Reversal is required, to stop this unlawful exercise of administrative authority.

[11] TeriDee does not like the Townships' cost study. This is because TeriDee forthrightly acknowledged to the SBC that it intends to sell or lease its property as soon as possible, thus rendering TeriDee unable to take advantage of the longer-term cost savings associated with Haring services. *Id*., 1447a (footnote 2).

5. The Timing of the Act 425 Agreement

The SBC Decision tries to make much of the fact that the Townships approved the Agreement after a City official mentioned that TeriDee *might* file another annexation petition – concluding that this paints the Townships with bad motives and therefore automatically invalidates the Agreement. *Id*., 14a (¶6.e). This is just another example of the SBC exercising extra-statutory authority, in derogation of the Act 425 statute.

As a threshold matter, the Townships point out that there is nothing in the plain language of Act 425 stating that an agreement must be entered at a particular time, or that it cannot be entered at a particular time, in order to be valid. The SBC would have to amend Act 425 to impose such a standard, which, of course, it cannot do. *People v Burton*, *supra*. That said, there is nothing objectively wrong with the timing of the Act 425 Agreement; its timing was entirely proper. The Agreement was approved by each Township on May 8, 2013, at a time when no annexation petition had even been filed with the SBC, covering the Transferred Area. Appendix, 1195a-1200a. And on that point, it is of course not possible to interfere with an annexation that does not exist. Moreover, the Agreement was approved at a time when the SBC had already determined – just eight months earlier – that TeriDee's property should *not* be annexed into the City. *Id*., 1112a. The Townships submit that it is not possible to interfere with an annexation petition that – just eight months earlier – had already been adjudicated, *by the SBC*, to be something that should <u>not</u> occur. How does one "interfere" with an annexation that has already been declared by the SBC to be improper? The SBC could not explain this.

That conspicuous silence notwithstanding, the Court needs to dispose of the SBC's related shibboleth that an Act 425 agreement is automatically invalid if it interferes with a proposed annexation. The simple answer to this shibboleth is that "*of course* the Townships' Agreement interferes with annexation." But not because the City or TeriDee says it does, not because the SBC

found it does, and not because a court might find that it does. It interferes with annexation because the Legislature has made the policy decision that Act 425 agreements are *supposed to* interfere with annexation. Under MCL 124.29, the Legislature has effectively relegated annexation to second-class status, by declaring that transfers under Act 425 are *always* preferable to annexation, and are therefore *always* to prevail over annexation, without any condition, exception or qualification. There has never been an Act 425 agreement that did not interfere with annexation, because the Legislature has decided that that is the intended purposes of *all* such agreements. MCL 124.29.

And this is why it was entirely proper for the Townships to enter an Act 425 Agreement on May 8, 2013, even though they anticipated it would have the effect of interfering with any annexation petition that TeriDee *might* thereafter file. It was proper for this type of Legislatively-sanctioned "interference" to occur because it promoted the *legitimate* governmental interests of the Townships. Specifically, the Townships had been actively planning, since at least the summer of 2011 (Appendix, 1508a-1510a) to enter a joint partnership for the sharing of sewer services, and had even jointly retained the same engineer to develop this project. *Id.*, 1515a. The Transferred Area is a pivotal part of that plan because it lies directly south of the Haring WWTP, on the shared boarder of the two Townships. It is in the Townships' designated utility-sharing corridor, where Haring utility lines are planned to enter Clam Lake. If this property was not to remain in the Townships, the ability of the Townships to share utilities might be lost forever, because other routes would be cost prohibitive.

And so the prospect of TeriDee potentially filing another annexation petition in June 2014 *involuntarily* forced the Townships into a position where, if they sat back and did nothing, the Transferred Area might be lost to the City forever. The Townships would be unable to share utilities, and their long-developed utility-sharing plan would have been rendered moot. This would have been a great detriment to the citizens whom the Clam Lake Board represents, because Clam

Lake would have been placed into a situation where it would have to forever kowtow to the City for utility services – capitulating to the City's demand that any served property be permanently added to the City. *Id*., 1191a-1193a. Clam Lake would have lost control of its own development destiny. And with respect to Haring, it would have lost a valuable new customer base at a time when it is actively looking for new customers for its new WWTP, to provide its citizens with the lower utility costs associated with economies of scale.

To prevent all of these public harms, the Townships took the *legitimate* governmental action of entering an Agreement that requires the extension of Haring water and sewer to the Transferred Area; allows reasonable economic development on the Transferred Area that is consistent with the regional land use plans; and, which otherwise satisfies the requirements of Act 425. And, ***yes!,*** it also interferes with TeriDee's annexation petition by keeping the property in the Townships. But simply because the Townships anticipated that this type of interference might result from their Agreement does not render the Agreement invalid. Interference is exactly what the Legislature intended in these circumstance. MCL 124.29. Neither an administrative agency nor a court has any business "interfering" with that Legislative policy choice. *Myers* at 644; *Christiana* at 689.

6. The Agreement Is Valid Under The SBC's *Casco Twp* Decision

As a final matter, the Townships' Act 425 Agreement is valid under the reasoning the SBC employed, itself, in the *Casco Twp* case. The SBC invalidated the *Casco Twp* agreements only because a transfer of territory had not actually taken place. Appendix, 1367a-1368a. But that is nothing like the Townships' Agreement. It is undisputed that, since June 10, 2013, the Transferred Area has been a part of Haring for the purpose of providing *all* Haring governmental services. *Id*., 728a-745a. All property tax records for the Transferred Area were already transferred to Haring, prior to the end of 2013. *Id*., 1355a-1358a. In addition, Clam Lake transferred the entire population of the Transferred Area to Haring before the end of 2013. *Id*., 1360a. These same persons already

had their voting records transferred to Haring in 2013, and some of them had already voted in a Haring election in August 2013. *Id*., 1361a-1362a. Thus, the Townships' Agreement accomplished a valid transfer under the standards that the SBC itself established in *Casco Twp*.

The proper conclusion, therefore, is that the Townships' Agreement is valid. The Agreement has accomplished a valid transfer of land under Act 425; it has the purpose of a planned economic development project; and it otherwise fulfills the criteria of Act 425. This means that annexation of the Transferred Area "shall not take place." MCL 124.29. The Court should so hold.

III. THE DOCTRINE OF COLLATERAL ESTOPPEL APPLIED SO AS TO INVALIDATE THE SBC'S 2014 APPROVAL OF THE TERIDEE ANNEXATION PETITION, ON THE BASIS OF THE SBC'S DENIAL OF THE IDENTICAL PETITION IN 2012

Standard of Review. The question of whether collateral estoppel applies to an agency decision is a question of law, which is subject to de novo review. *Holton v Ward*, 303 Mich App 718, 731; 847 NW2d 1 (2014).

A. The SBC Is Subject To Collateral Estoppel

Collateral estoppel, also known as issue preclusion, is a common-law doctrine that gives finality to decisions. *People v Wilson*, 496 Mich 91, 98; 852 NW2d 134 (2014). Among its primary purposes are to prevent inconsistent decisions and to encourage reliance on adjudications. *Id*. at 99. Collateral estoppel applies to administrative proceedings if the determination was adjudicatory in nature, allowed for an appeal, and the Legislature intended that the decision would be final if no appeal was taken. *Holton* at 731-732. SBC annexation proceedings fit these requirements. They are considered adjudicative in nature (MAC R 123.20-123.23); an appeal is allowed (MCL 123.1018); and the Legislature has decided that these decisions are "final" when no appeal is taken (MCL 117.9(12) and MAC R 123.23).

It has also been held that, for collateral estoppel to apply to an administrative decision, "the ultimate issue to be concluded in the second action must be identical to that involved in the first, not

merely similar." *Eaton Co Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). Once again, that criterion is satisfied, because the recent proceedings involved the identical annexation petition that the SBC already denied in the 2011-2012 proceedings, and both petitions were subject to the exact same statutory criteria of MCL 123.1009. When collateral estoppel applies, as it does here, "[a]n administrative agency's decision is conclusive of the rights of the parties, or their privies, in all other actions or suits in the same or any other tribunal of concurrent jurisdiction on the points and matters in issue in the first proceeding." *Holton*, *supra* at 732.

And while it is true that collateral estoppel should not be applied to "stale" decisions where there has been "subsequent modification of the significant facts or a change or development in the controlling legal principles," (*Hlady v Wolverine Bolt Co*, 393 Mich 368, 390; 224 NW2d 856 (1975)), that rule does not apply here because there has been absolutely no change in circumstance between the two SBC decisions. It is undisputed that surrounding zoning and land uses are the same; the regional land use plan is the same; City sewer and water lines are the same distance away; TeriDee wants the same type of commercial development; TeriDee still wants the same public services; population and population density have remained substantially identical; the public opposition to annexation is still as strong as ever (if not stronger); the same 750% tax disparity still exists between the Township and the City; the region's commercial centers are still located in (a) the City's core, (b) the Boon Road/Mitchell corridor in Haring (Exit 183), and (c) the Clam Lake DDA (Exits 176/177), but not in the annexation area; the City and the Townships still provide the same public services; the topography and surrounding roadways have not changed; there has been no change in natural boundaries or drainage; the M-55/U.S.-131 intersection continues to have the least traffic of the Cadillac-area interchanges; etc.

The list could go on and on, but it becomes superfluous at a point. It is as though the SBC said "black is black" in October 2012 and then said "black is white" in June 2014, on the *identical*

circumstances presented by the same parties under the exact same law. Could there possibly be a decision more properly characterized as being arbitrary and capricious, to wit, "apt to change suddenly; freakish; whimsical"? *See Bundo v Walled Lake*, 395 Mich 679, 730, n17; 238 NW2d 154 (1976). Collateral estoppel should have prevented these dichotomous results.

The circuit court nonetheless held that MCL 117.9(6) exempts the SBC from collateral estoppel. Appendix, 142a-143a. That statutory provision states, in pertinent part, as follows:

> The commission shall reject a petition or resolution for annexation of territory that includes all or any part of the territory which was described in any petition or resolution for annexation filed within the preceding 2 years and which was denied by the commission. . . MCL 117.9(6).

The circuit court held that the Legislature, by adopting MCL 117.9(6) and thereby allowing a landowner to submit an identical petition two years after a previous denial, intended to exempt the SBC from the common law doctrine of collateral estoppel. This was a novel decision, for the reason that the Michigan appellate courts have *never* exempted an administrative agency from the common law rule of collateral estoppel. The circuit court thus gave unique status to the SBC, as being the *only* Michigan administrative agency that is ostensibly allowed to engage in arbitrary and capricious decision-making, by ignoring its prior decisions. This was not only novel, it was legal error.

As a predicate matter, it must be observed that the Legislature has not affirmatively authorized the re-filing of a previously-denied annexation petition under MCL 117.9(6). That statute is instead written in *prohibitive* terms that *require* the SBC to *automatically reject* an identical petition that has been submitted less than two years after a previous denial.[12] In other words, MCL 117.9(6) erects a two-year jurisdictional prohibition on SBC consideration of a previously-denied annexation petition, but the statute says nothing about what may or may not occur after the two-year prohibition has expired. This means that the Legislature has done *nothing* to alter the common law

[12] *See St Joseph Twp v SBC*, 101 Mich App 407, 414; 300 NW2d 578 (1981) (holding that that purpose of MCL 117.9(6) is to "prevent[] a municipality from filing repeated petitions.").

rules concerning the applicability of collateral estoppel to the SBC. In the face of such Legislative silence, the common law rules of collateral estoppel do apply to the SBC, as a matter of law.[13]

Significantly, the circuit court's interpretation of MCL 117.9(6) conflicts not only with the Michigan common law of collateral estoppel, but also conflicts with the decisions of every other court that has considered a similar type of statute. In that regard, there are at least two similar statutes that provide an express right to reapply for a governmental approval after a prior denying decision. Those statutes include Subchapter II of the federal Social Security Act (the "Act"), 42 USC §401, *et seq.*, and the federal Black Lung Benefits Act, 30 USC § 901, *et seq.*, which is a part of the federal Mine Safety and Health Act, 30 USC §801, *et seq.* When considering those statutes, the courts have uniformly recognized that collateral estoppel (or res judicata) applies to the reapplication process – holding that both the applicant and the administrative decision-maker are bound by a first decision on an application, absent a material change in circumstances between the first decision and the re-submission of the same application at a later date.[14] The Tenth Circuit, in the *Wyoming Fuel* case, explained that this must necessarily be the rule, or else the reapplication process would make "mincemeat" out of principles of res judicata. *Wyoming Fuel* at 90 F3d 1508.

The circuit court should have followed the rule established by these persuasive cases. By interpreting MCL 117.9(6) differently, the circuit court effectively held that the Legislature adopted

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[13] "Legislative amendment of common law is not lightly presumed nor will statutes be extended by implication to abrogate established rules of common law." *Hasty v Broughton*, 133 Mich App 107, 113; 348 NW2d 299 (1984).

[14] The cases decided under the Social Security Act include *Drummond v Comm of Social Security*, 126 F3d 837, 842 (CA6, 1997); *Lively v Sec of Health and Human Services*, 820 F2d 1391, 1392 (CA4, 1987); *Wilson v Califano*, 580 F2d 208, 211 (CA6, 1978); *Groves v Apfel*, 148 F3d 809, 810 (CA7, 1998); *Hillier v Social Security Admin*, 486 F3d 359, 365 (CA8, 2007); and, *Lyle v Sec of Health and Human Services*, 700 F2d 566, 568 (CA9, 1983).

The cases decided under the Black Lung Benefits Act include *Sahara Coal Co v Office of Workers' Compensation Programs*, 946 F2d 554, 556 (CA7, 1991); *Grundy Mining Co v Flynn*, 353 F3d 467, 476-477 (CA6, 2003); and, *Wyoming Fuel Co v Director, Office of Workers' Compensation Programs, US Dept of Labor*, 90 F3d 1502, 1508-1509 (CA10, 1996).

this statute with the intention of allowing the SBC to engage in arbitrary and capricious decision-making. Specifically, the circuit court held that MCL 117.9(6) has the intended purpose of allowing the SBC to make opposite decisions on the exact same petition that is subject to the exact same legal standards (MCL 123.1009), and which has been submitted by the exact same parties, simply because two years has elapsed, even though there has not been a single change in material circumstance that might be relevant to the criteria of MCL 123.1009. In other words, the circuit court held that the Legislature intended to make "mincemeat" out of the common law rule of collateral estoppel, which otherwise applies to every administrative tribunal in the State of Michigan.

That proposition is untenable. In Michigan, administrative tribunals are universally subject to principles of collateral estoppel, under the common law. *Holton, supra*. If the Legislature had wanted to abrogate that common law rule by statute, insofar as the SBC is concerned, the Legislature could have done so only through plain and explicit statutory language. *Hasty* at 113. The Legislature has not done this. To the contrary, MCL 117.9(6) merely reflects the same principles reflected in federal statutes such as the Social Security Act and the Black Lung Benefits Act, to wit, that a party should have an opportunity to reapply for the same approval, upon a showing that there has been a material change in circumstances, due to passage of time, since an earlier denial. This makes sense in the particular context of annexation petitions, because the conditions that could influence the criteria of MCL 123.1009 are not necessarily static; they have the potential to be dynamic over a period of two years or more. For example, surrounding land use, proximity of utilities and other factors could potentially experience a material change over the course of two years. Here, however, the Court just happens to be dealing with a particular situation that has remained wholly static since October 2012, and so collateral estoppel should have resulted in denial of the TeriDee annexation petition. The Court should so hold.

B. MCL 123.1012(3) is Inapplicable

In the Order granting leave to appeal, the Court also asked the parties to address whether MCL 123.1012(3) has any bearing on whether the SBC is subject to collateral estoppel when it makes a decision on an annexation petition. Appendix, 148a. It does not. By the plain terms of MCL 123.1012(3) , it applies only to "consolidation" petitions, not petitions for annexation:

> The petition shall name the municipalities proposed to be **consolidated** and shall request the commission to take the proceedings necessary for **consolidation** under this act. The commission shall reject a **petition for consolidation** if a proposition to consolidate the identical municipalities has been voted on within the 2 years immediately preceding the filing of the later petition. This shall not prevent the **consolidation** of 2 or more municipalities, which were included in a proposed **consolidation** voted on in the preceding 2 years, with or without additional territory, if the prior proposition included 1 or more municipalities which are not included in the later proposition. MCL 123.1012(3). [Emphasis added].

Reflective of the fact that MCL 123.1012(3) applies only to consolidations, the two-year prohibitions stated in MCL 117.9(6) and MCL 123.1012(3) are measured differently. For annexation petitions, the two-year prohibition runs from the time the previous petition was "filed," as provided by MCL 117.9(6); whereas, for consolidation petitions, the two-year prohibition runs from the time the previous petition was "voted on," as provided by MCL 123.1012(3) . And so by establishing different timing rules for annexation and consolidation petitions, the Legislature has made clear that MCL 123.1012(3) does not apply to annexations.[15]

That said, if the Court disagrees, and thus holds that MCL 123.1012(3) *does* apply to annexation petitions, then the Townships are entitled to immediate judgment. This is so because TeriDee's most recent annexation petition was filed on June 5, 2013 (Appendix, 761a), which was only ten months after the SBC "voted on" on TeriDee's prior annexation petition for the same lands on August 8, 2012 (*id.*, 1118a). In other words, it was filed 14 months *too early* under the standards

[15] Notably, however, MCL 117.9(6) and MCL 123.1012(3) are similar in one important respect: each statute is written in the same prohibitory terms, saying nothing about what may or may not occur after the two-year prohibition has expired. Thus, neither statute reflects a Legislative intent to overrule the common law principles of collateral estoppel that apply to all administrative agencies, including the SBC.

of MCL 123.1012(3) . Thus, if the Court holds that MCL 123.1012(3) applies to annexation petitions, then the SBC would have been required by law to reject TeriDee's petition, thus making the annexation void. The Court should so hold, if it finds that MCL 123.1012(3) is applicable.

CONCLUSION AND REQUEST FOR RELIEF

The oft-stated maxim is that "easy cases make bad law." *Casco Twp* is one of those cases. The Act 425 agreements at issue in that case clearly did not satisfy the main criterion of Act 425 (i.e., they did not include an economic development project)[16], thus making it "easy" for the Court of Appeals to have affirmed the SBC's invalidation of those agreements. But *Casco Twp* nonetheless represents "bad law," for the reason that the SBC has no jurisdiction to decide the validity of an Act 425 agreement, as shown by the fact that Act 425 does not even mention the SBC. The Court should therefore reverse, on the ground that the SBC was without subject matter jurisdiction. If this is not done, the Townships nonetheless respectfully request that this Honorable Court reverse on the grounds that the SBC wrongfully invalidated the Act 425 Agreement, and that the SBC violated principles of collateral estoppel when it approved the annexation petition. Upon reversal, the Court should hold and declare that (a) the SBC's approval of the TeriDee annexation petition is void; (b) the Townships' Act 425 Agreement is valid and enforceable; and, (c) the Transferred Area has been within Haring's jurisdiction since June 10, 2013, when the Act 425 Agreement became effective.

Respectfully submitted,

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Dated: May 10, 2016

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[16] The substantive provisions of the *Casco* agreements did not identify *any* economic development project. Appendix, 678a-721a. The recitals of those agreements (*id*., 680a; 702a) merely acknowledged a generic "need" for economic development projects, without any project actually being identified or planned, in violation of MCL 124.22(1).